Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL.,

Petitioners,

vs.

BERRY H. YOUNG, JR., ET AL.,

and

THE UNITED STATES OF AMERICA and THE FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Ann E. Bibler, Administratrix of the Estate of Ralph Bibler, deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals was reported in 492 F.2d 1351 (6th Cir. 1974), and appears in the separately printed appendix. The unreported opinion of the District Court for the Southern District of Ohio, appears in the separately printed appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

QUESTIONS PRESENTED

1. Whether or not 14 C.F.R. Section 91.67, the Right of Way Rules, are applicable to aircraft operating within air traffic control areas, and if so, was respondent, Young, negligent in failing to observe the provisions thereof?

2. For purposes of 14 C.F.R. Section 91.87 regarding radio contact with control towers, is approach control an entity of the control tower as that term is construed in Section 14 Section 91.87?

3. Was the United States, through its agent, the Federal Aviation Administration, negligent in failing to warn the decedent, Bibler, of the presence of another aircraft in competing airspace?

4. Was the United States, through its agent, the Federal Aviation Administration negligent in failing to adhere to its procedural guide lines and advise decedent, Bibler, to contact local control at the outer marker?

5. Whether the proximate cause of the collision of the two aircraft approaching the same runway was the failure of approach control to observe the danger and warn the pilot?

STATUTORY PROVISIONS INVOLVED

(Printed in separately bound Appendix)

Code of Federal Regulations, Chapter 14:

> Section 91.67 Right of Way Rules; except water operations.
>
> Section 91.87 (a), (b) Operation at airports with operating control towers.

STATEMENT OF THE CASE

The jurisdiction of the Federal Court was invoked in the case as the action was brought under the Federal Tort Claims Act (18 U.S.C. Section 1346(b)). The action was brought by the petitioner, Ann Bibler, as Administratrix of her husband's estate against the United States and the Federal Aviation Administration for the wrongful death of her husband who was killed in a mid-air collision. Petitioner also sued respondent's Young and Ohio Aviation Distributors, Inc., the pilot and owner of the other plane.

In a related state case Sundin, the owner of the aircraft in which Bibler was killed, sued all the respondent's for property damage. By stipulation of all parties the cases were tried in the United States District Court for the Southern District of Ohio. Judge Rubin held that the petitioner's claims were barred by the contributory negligence of the deceased pilot.

In affirming the judgment of the District Court, the Court of Appeals held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell the pilot Bibler to contact the local controller, but that this negligence was not the proximate cause of the collision. (App. p. 3). The Court of Appeals found that respondent, Young was not guilty of any negligence. The court also found Bibler contributorily negligent in that he failed to maintain contact with the control tower while in an airport traffic area. (App. pp. 14-15).

The mid-air collision occurred approximately two miles east of Port Columbus Airport, Columbus, Ohio on April 10, 1968. The petitioner's decedent, Bibler, was an instructor-pilot in aircraft 39J, and respondent, Young was piloting 18N. The respondent, United States and the Federal Aviation Administration operate the control tower at Port Columbus Airport. The control tower at Columbus Airport is divided into separate functions; Approach Control and Local Control are relevant to case at bar. Both aircraft were approaching Run-

way 28L at the airport, 18N for the purpose of landing and 39J was completing a second practice instrument approach and had informed Approach Control of his intention to conduct a third. Approximately one-fourth of the rear section of 39J was severed in the collision including the entire tail section. It immediately fell to the ground killing Bibler and a student pilot. 18N, with a portion of the tail section of 39J wrapped around its propeller made a safe emergency landing in a nearby field.

The reconstruction of the events preceding the collision are based entirely upon the tape recordings of all transmissions made to and by Approach and Local Control. A typed statement of these transmissions including time sequence is contained in pages 172 through 189 of the Appendix to the Appellants' Brief contained in the record transmitted to the Court. At 1457:50, 39J requests a second practice instrument approach after having successfully completed a first. Approach Control immediately acknowledged and then at 1502:26 Approach Control instructs 39J to turn to a heading of 260 degrees intercept the final approach course and clears him for a straight-in instrument approach to Runway 28L. At the same time 39J informs Approach Control he plans to execute a third missed approach and not to land. At 1503:23 Approach Control informs Local Control on the intercommunication line of 39J's presence on the localizer and informs Local Control to turn 39J south if he gets in the way. At 1503:47 Approach Control informs 39J he is one mile from the outer marker and that he will be spaced in reference to a Lake Central Nord aircraft approaching Runway 28L.

Between 1503:47 and 1504:24, 18N contacts Local Control and identifies himself as two miles south of the outer marker. During the same period Approach Control and Local Control are exchanging conversations on the intercommunication line regarding the location of the Approach Controller's wife. Shortly after 1504:24 Local Control advises 18N to plan to land on Runway 28L and that he is number two behind a Lake Central Nord. At 1504:34 Local Control informs Ap-

proach Control of the presence of 18N south of the outer marker. Next Local Control next informs 18N that he believes he has him in sight and clears him to land on Runway 28L. At 1507:45, 39J advises Approach Control that he is "just a beam off Western Electric." It is at this approximate point that 18N strikes 39J on the left rear side of 39J and at an angle of approximately 30 degrees.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE STANDARD OF CARE REQUIRED OF GOVERNMENT AIR TRAFFIC CONTROLLERS.

The exemptions of Federal Tort Claims Act were held not to preclude recovery against the government for the negligence of Air Traffic Control for landing two aircraft on the same runway in *Eastern Airlines* v. *Union Trust Company*, 221 F. 2d 62 (D.C. Cir. 1955), aff'd. sub nom., *United States* v. *Union Trust Company*, 350 U.S. 907 (1955). After this decision the duty of the air traffic controller has been expanded in scope commensurate with the requirements of air safety. The duty to warn is based on the simple principal that once the government has assumed a function or service, it is liable for negligent performance. *Indian Towing Company, Inc.* v. *United States*, 350 U.S. 61, 64-65, (1955). The lower standard of care imposed on the government by the Court below is in conflict with the standard imposed by other Circuits and merits review by this Court.

The Second Circuit in *Ingham* v. *United States*, 373 F. 2d 227 (2nd Cir. 1967), cert. denied, 389 U.S. 931 (1967), held that the controller had to do more than merely comply with operating procedures required by ATC manuals. The controller's twelve minute delay to advise the pilot of a change in weather was deemed negligence and a proximate cause of the crash of the airliner.

The same standard was imposed on ATC by the Ninth Circuit in *United States* v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967), wherein the pilot had been given the procedures manual warnings regarding wake turbulence, but proceeded to land as the controller watched. The Court found an "overriding duty" of safety that went beyond the requirements of the procedures manual and held there was a duty to repeat the warning when it was apparent to ATC that the pilot was in obvious danger.

In *Hartz* v. *United States*, 387 F. 2d 870 (5th Cir. 1968), the Fifth Circuit in deciding the duty of government air traffic controllers held that before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known, those facts which were then material to the safe operation of his aircraft. In *Hartz*, the controller's warning to the pilot to "watch the prop wash" was held to be insufficient warning of a wake turbulence. The controller was held to have a superior duty because of both the controller's better physical position for observation and his experience. The controller's negligence in failing to delay the take-off for a reasonable time was held to have been the proximate cause of the crash of a small plane on take-off into the turbulence from the prior take-off of a commercial airliner. Thus, establishing that pilot action could not be the proximate cause until he is charged with all the facts.

The duty of the air traffic controller was similarly decided by the Ninth Circuit in *Spaulding* v. *United States*, 455 F. 2d 222 (9th Cir. 1972). The controller is required to give all information and warnings specified in his manuals, and in certain situations he must give information beyond the manuals. *Spaulding*, *supra*, cited *Hartz*, *supra*, as an example of where the situation requires the controller to give additional warnings as the controller is better qualified to evaluate the actual situation.

The Fifth Circuit, again in *Gill* v. *United States*, 429 F. 2d 1072 (5th Cir. 1970) similarly held the duty of the United

States to exercise due care in providing services to airplane pilots rests either upon requirements of procedures manuals or upon general pilot reliance upon the government for the given service.

In *United Air Lines* v. *Weiner*, 335 F. 2d 379 (9th Cir. 1954), warnings beyond those prescribed in the manual were required when danger is known only to federal personnel. In *Weiner*, the controller failed to warn aircraft of the potential invasion of its airspace by a military jet.

Of the entities involved Approach Control alone possessed all the essential information necessary to avoid the crash. (App. p. 11). Thus the government of all the parties involved was better qualified to evaluate the situation and required by the standard set forth in *Hartz, supra*, to warn the aircraft of the danger. The Court of Appeals affirmed the District Courts' finding that the radar screen used by Approach Control was available to alert the controller of the decreasing separation between the two planes.

Under the standards set forth in *Hartz*, and the other cited cases, Bibler cannot be held legally responsible for the movement of his aircraft until he knows or can be held to have known, those facts which were material to the safe operation of his aircraft. Bibler did not know, nor was he capable of knowing where 18N was located. Approach Control possessed such knowledge. It was this negligence of Approach Control that proximately caused this collision, not any negligence on Bibler's part. Bibler's failure to contact Local Control can not be considered proximate cause when Approach Control has a duty to warn pilots of danger before the pilot is legally responsible.

The conflicting lesser degree of care required by the decision below is exemplified by the fact that Approach Control failed to even give the warnings required by procedures manuals. Under Section 674 of the Terminal Air Traffic Control Manual (App. D), the Approach Controller is required to issue certain instructions to the pilot regarding

switching to Local Control. This he failed to do. Approach Control did not even satisfy these requirements. Thus, the court below has set forth a standard far below those decided by other Courts of Appeals requiring the government to give warnings beyond those prescribed in the manuals.

These decisions because of conflicting nature of the duty prescribed for the air traffic controller involves questions of import beyond the parties involved in this case. If the decision below is allowed to stand the safety of operations at major airports will be jeopardized. The Sixth Circuit has imposed a standard of care on the government that is not commensurate with the task undertaken by the Federal Aviation Administration, namely the safety of air traffic in this county's airports. The decision of the court below and those of the Fifth, Second and Ninth Circuits need be reconciled to ensure a uniform standard.

2. THE INTERPRETATION OF 14 C.F.R. SECTION 91.87 ADOPTED BY THE COURT BELOW RAISES SIGNIFICANT PROBLEMS IMPORTANT TO THE SAFE OPERATION OF AIR TRAVEL.

The Federal Aviation Administration Regulations interpreted by the court below includes:

> *Communications with control towers operated by the United States.* No person may within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. . . 14 C.F.R. Section 91.87(b) (1968).

The Court of Appeals affirmed the District Judge's finding that Bibler was guilty of contributory negligence consisting of failing to contact the Tower as he passed the outer marker

and failing to maintain radio cont. t with the Tower while in the airport traffic area. (App. p. 15). This finding of negligence was premised a "violation of the above regulation."

In affirming the finding of contributory negligence the court below discusses Bibler's failure to communicate with the "Tower." The District Court and the Court of Appeals are both confused by terms. The regulation quoted above prohibits flying within an airport traffic area unless two-way radio communications is maintained between the aircraft and the control tower. The term control tower is not limiting. In Appendix E is contained an excerpt from the FAA's Instrument Flying Handbook. It is important to note that the term "control tower" refers to five different subgroupings. The term control tower includes Local Control, Ground Control, Clearance Delivery, Departure Control and Approach Control. For some reason, both the District Court and the Court of Appeals concluded that the control tower, commonly referred to as Local Control, and Approach Control are two separate and distinct entities. This is not the case and was never intended by the regulation. Bibler was in contact with the "control tower" by maintaining two-way communications with Approach Control. Both the Sixth Circuit Court of Appeals and the District Court are wrong and have missed the point of the regulation when they hold otherwise.

In the opinion of the Court of Appeals at App. p. 2, the District Court's finding of fact concerning the functions of the control tower are set forth. The findings state:

> "The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus *control tower.* There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control, also known as Local Control (TWR), which has jurisdiction over air traffic within the five mile radius." (Emphasis added).

The court correctly states the relationship among the terms control tower, Approach Control and Local Control. That is, that the term control tower includes the functions of Local Control and Approach Control. Yet in finding Bibler contributorily negligent, thus barring any recovery, both the District Court and the Court of Appeals concluded he had violated the regulation requiring contact with the control tower. The undisputed facts show Bibler maintained radio contact with Approach Control. Thus the finding of contributory negligence is based on the erroneous assumption that the term control tower does not encompass the Approach Control function.

The finding that Bibler violated 14 C.F.R. 91.87 by failing to maintain radio contact with the tower can only be based on the erroneous conclusion that the control tower does not include the Approach Controller. It is this erroneous construction of the Federal Air Regulations that this Court should review. Such construction will have a harsh effect on the operation of air traffic control facilities endangering the safety of all persons flying in and out of tower controlled airports in the United States.

This interpretation permits the government to, in effect, become two parties in this and other actions against the United States for negligent performance of control tower functions. On the facts of this case, as found by both the District Court and the Court of Appeals, Bibler was in radio contact with Approach Control at Port Columbus Airport, and concurrently respondent, Young, was communicating with Local Control. Both planes were being guided toward the same runway by two units of the same Air Traffic Control facility. A case of the right hand not knowing what the left is doing, certainly a violation of the high standard of care imposed on the government by the line of decisions in the Fifth, Ninth, and Second Circuits, supra.

The Federal Aviation Administration employees who con-

trol air traffic in our major airports are the agents of one party, the United States of America, which is responsible for their negligent performance that was proximate cause of this tragic accident. To exonerate the United States because two of its agents, who were in interphone contact with each other, directed two planes to approach the same runway at the same time is ludicrous.

In one case where this issue was present, a District Court held that one government air traffic controller cannot authorize an airplane to fly a collision course with another airplane then being monitored by another government controller and escape liability by claiming neither controller had a duty to separate them. *Cattarro* v. *Northwest Airlines, Inc.*, 236 F. Supp. 889 (D.C. Vir. 1964).

It is important that this Court determine the proper interpretation of 14 C.F.R. Section 91.87. The respective duties incumbent on pilot and controller must be determined. In order for this to be accomplished, the proper interpretation of the term control tower must be established. The procedures manuals, charts, and regulations that govern aviation are predicated on the Court's interpretation of the air traffic controller's duty of care. With nationwide aviation traffic, it is both impractical and dangerous for this standard to vary among the Circuits. Further, it is conceivable that following this decision one aircraft in contact with the one government controller might land on one runway, while a second aircraft, in contact with a second government controller, would land on the same runway at the same time with catastrophic results. To avoid such consequences petitioner respectfully submits that this Court should review this case and establish a standard of care for government air traffic control facilities commensurate with the responsibility for human life placed upon them.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 14 C.F.R. SECTION 91.67.

In finding that Respondent, Young, was not guilty of any negligence, the Sixth Circuit held that he had not violated the right of way rules promulgated in the Federal Air Regulations:

> (e) OVERTAKING. Each aircraft that is being overtaken has the right of way and each pilot of an overtaking aircraft shall alter course to the right to pass will clear.
>
> (f) LANDING. Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft. 14 C.F.R. Section 91.-67(e) & (f) (1973).

As stated by the Court below, Young's plane was both above and behind Bibler's. (App. 18). This under the language of Section 91.67(f) states Bibler had the right of way as he was at the lower altitude. However, the court found that Young could not see Bibler because of the configuration of his plane. (App. p. 18). This finding is based on the Court's opinion that Young was not required to take any further measures to observe Bibler or any other aircraft that might be in his path. This conclusion is in conflict with the duty imposed upon pilots by other Circuits interpreting the right of way rules.

The argument that the rules of right of way do not apply to Young is predicated on a note to 14 C.F.R. Section 60.14 reading in part:

> "Note: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility."

The Ninth Circuit in *United States* v. *Miller*, 303 F. 2d 703 (9th Cir. 1962), held that the configuration of the aircraft was not "beyond the pilot's control" and thus the note did not relieve the pilot of his duty to look out for other aircraft. This imposes a duty on the pilot to observe the right of way rules where by altering the plane's position the pilot can observe the area beneath and in front of his descending aircraft.

Thus the holding in *Miller* and that of the Court below imposes are directly in conflict as to the standard of care imposed on pilots by the Federal Air Regulations dealing with right of way, an area of aviation law whose effect on air safety is obvious. *Miller*, supra, involved two aircraft that collided while in an airport traffic area and under the control of government air traffic controllers. Thus the right of way rules were held applicable in the airport traffic area and the instant case is not distinguishable on that ground.

In *New York Airways, Inc.* v. *United States*, 283 F. 2d 496 (2d Cir. 1960), the Second Circuit found the pilot of a helicopter negligent in that he failed to manuever his aircraft to keep the touchdown area in sight. Thus imposing a duty to observe as in *United States* v. *Miller*, supra. Also in *George* v. *American Airlines, Inc.*, 295 F. 2d 311 (7th Cir. 1961), the crew of an air carrier were held negligent for failure to maintain a proper lookout. These cases all exhibit the imposition of a higher standard of care on pilots to observe other aircraft than does the decision of the Court below.

The Sixth Circuit states that the respondent, Young, was not in violation of the right-of-way rules as he had a clearance to land and the petitioner did not. The petitioner respectfully submits that this determination is an error. The fact that Bibler was not going to actually land does not alter the fact that he was cleared to approach runway 28L and should

have been observed by the respondent, Young. Further the Court below stated:

> "At the time and place concerned, Young did not know that what turned out to be Bibler's plane (39J) was even in the airport traffic area." (App. p. 18).

This statement is clearly an error. The flight transcript reveals that the local controller warned Young of Bibler's presence. When Young communicated to the Columbus tower that he was approaching the airport for a landing and was located south of the outer marker the Columbus local controller responded:

> "18N south of charlie mike plan runway 28L presently no. 2 following a nord on a right base leg for 28L and watch for traffic coming up on the marker, be making an aisle s (instrument) low approach."

The local controller had immediately prior to this point been told of the presence of 39J on the ILS approach.

The foregoing demonstrates that the conclusion of the Sixth Circuit Court of Appeals that Young had not violated the right-of-way rules was in error. This erroneous application of the rules should be reversed by this Court. More importantly, and even disregarding the Court's factual conclusions. The standard of care imposed on pilots by the Sixth Circuit Court of Appeals departs from that standard imposed by the Ninth Circuit in *United States* v. *Miller*, supra. The Sixth Circuit Court of Appeals has lowered the standard of care imposed on pilots at the expense of air safety. The conflict in interpretation of the Federal Air Regulations, and the differing standards imposed thereunder must be resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A.
REGULATIONS INVOLVED

14 C.F.R. § 91.67 Right-of-way Rules; Except Water Operations.

(a) GENERAL. Except when, because of restrictions to visibility beyond the pilot's control, another aircraft cannot be seen, each person operating an aircraft shall comply with this section. When a rule of this section gives another aircraft the right-of-way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

(e) OVERTAKING. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

(f) LANDING. Aircraft, while on final approach to land, or while landing have the right-of-way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft.

14 C.F.R. § 91.87 Operation at airports with operating control towers.

(a) GENERAL. Unless otherwise authorized or required by ATC, each person operating an aircraft to, from, or on an airport with an operating control tower shall comply with the applicable provisions of this section.

(b) COMMUNICATIONS WITH CONTROL TOWERS OPERATED BY THE UNITED STATES. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with Section 91.127.

APPENDIX B.

OPINION OF THE COURT OF APPEALS

Nos. 73-1201-02

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL., *Plaintiffs-Appellants*,

v.

BERRY H. YOUNG, JR., ET AL., *Defendants-Appellees*.

UNITED STATES OF AMERICA, AND THE FEDERAL AVIATION ADMINISTRATION, *Third-Party Plaintiffs-Appellants*,

v.

BERRY H. YOUNG, JR., ET AL., *Third-Party Defendants-Appellees*.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 27, 1974.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

EDWARDS, Circuit Judge. The widow of a deceased airplane pilot and instructor appeals from the judgment of the United States District Court for the Southern District of Ohio dismissing her complaint. The District Judge who tried this case without a jury found for the defendants on the ground of contributory negligence on the part of her husband who

was killed in an airplane crash. The suit was brought under the Federal Tort Claims Act (18 U.S.C. § 1346(b) (1970)), by Ann Bibler, as Administratrix of her husband's estate, on behalf of herself and their minor child against the United States and the Federal Aviation Administration, the operator of the control tower at the Columbus, Ohio, airport where the crash occurred. She also sued the owner and operator of the other aircraft which collided with Bibler's plane. The United States answered denying negligence and claimed indemnification against defendants Young and Ohio Aviation Distributors, Inc., the operator and the owner of the other plane.

By stipulation of the parties, another related state case was submitted to the court wherein Sundin, the owner of the plane in which Bibler was killed, sued all the same defendants for property damage occasioned by their claimed negligence. In turn Ohio Aviation counterclaimed for the damages to its plane.

The cases were heard before Judge Rubin in the United States District Court for the Southern District of Ohio. Judge Rubin held that the plaintiffs' claims were barred by the contributory negligence of the deceased pilot, Bibler, in that "He failed to advise the Local Control that he had passed the outer marker" in making a simulated landing at Port Columbus International Airport, and in that he failed to make and maintain radio contact with the Local Controller while over the airport area. The District Judge held that pilot Young was not guilty of negligence and awarded $17,000 damages to Ohio Aviation for the damage to the plane Young was flying. He also held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell pilot Bibler to contact Local Control. But he held that this negligence was not the proximate cause of the accident. The District Judge also held that the Local Controller at the Port Columbus Airport was not guilty of negligence.

There were four parties involved in this air collision which

resulted in the death of two people. This record, as we view it, indicates that any one of the four might have prevented the crash. But actionable negligence does not consist of failing to take extraordinary measures which hindsight demonstrates would have been helpful. It consists of doing or failing to do what a reasonable man would do under the circumstances contronting him.

This appeal disputes the interpretation of the applicable rules and regulations and the inferences from the facts drawn by the District Judge. Many of the facts in this case were stipulated and none of them are currently in dispute.

We recite them from the District Judge's findings of fact:

"FINDINGS OF FACT

Finding of Fact (1)

General Conditions at Columbus International Airport

Columbus International Airport, known by pilots as CMH, is located in Franklin County, Ohio, immediately east of the City of Columbus. Its main runways lie in an east-west direction. Airport runways are identified by the first two digits of direction. Accordingly, the two main runways of Port Columbus are 28 left and 28 right, indicating an east to west bearing of approximately 280 degrees. When used west to east the same runways are known as 10 left and 10 right, signifying a heading of approximately 100 degrees. The precise magnetic bearing of 28 left and 28 right is 276 degrees.

Runway 28 left is 10,700 feet long and 150 feet wide. It is equipped for instrument landing and includes an electronic extension in the same compass heading referred to as a 'beam.' At a point 5.4 nautical miles (6.2 statute miles) east of runway 28's left threshold is the 'outer marker.' An outer marker is an electronic device that advises a pilot when he has passed over it on his way to a landing.

Between the outer marker and the runway threshold there is a middle marker which likewise electronically

advises the pilot that he has passed over such marker. A pilot may receive such information by a Beacon Marker Indicator which will cause a light to flash on the instrument panel and an audible radio signal to be given, or by a low frequency ADF receiver which will receive in Morse Code the identifying letters of the marker. The outer marker on runway 28 left is identified by the letters CM and is known by the term 'Charlie Mike.'

A plane need not contain such equipment in order to use part of the electronic extension of runway 28 left. A plane can be equipped merely to ascertain its position in relation to the electronic extension or 'localizer beam' and be guided onto the localizer for ultimate landing on the runway.

The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus control tower. There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control, also known as Local Control (TWR),[1] which has jurisdiction over air traffic within the five mile radius. APC operations extend for approximately forty miles around Port Columbus. Local Control is housed at the top of the control tower. In 1968, when this accident occurred, Local Control did not have radar equipment and relied on visual sightings to identify and direct landing aircraft. The two control departments communicate with pilots on assigned frequencies: APC on 119.0 megahertz and TWR on 121.5. Because their jurisdictions are exclusive, pilots do not customarily communicate with both departments simultaneously.

When a pilot is flying under instrument flight regulations (IFR), he communicates with Approach Control until he reaches the outer marker. At this time he is

[1] The terms Local Control, Local Tower or Tower as used herein are synonymous and are all identified at TWR.

advised to contact Local Control in the tower on its frequency and report his presence. When a pilot is flying under visual flight regulations (VFR) he is not required to advise Approach Control of his presence, but contacts instead Local Control when he is in the vicinity of the outer marker.

Finding of Fact (2)

Cherokee N42 39J (39 Juliet)[2]

On April 10, 1968, Ralph D. Bibler, decedent, was a duly qualified and licensed commercial pilot and flight instructor with over 1000 hours of pilot flight time. He was in command of a Piper Cherokee aircraft, Registration No. N4239J. At approximately 3:00 p.m. on that date, he was instructing a student, one David Dunnick, in the procedures for instrument landing at Port Columbus. Mr. Dunnick had logged 123 hours of flight time. The plane was equipped with an omni-converter for localizer guidance. It was not equipped with an ADF radio Beacon Marker Indicator or any other electronic means of establishing position in relation to the outer marker. Prior to 3:00 p.m., 39 Juliet was operating under Instrument Flight Regulations (IFR) procedures with student Dunnick at the controls. Dunnick was wearing a 'hood,' a vision limiting device which focused his attention upon the instrument panel. As the operating pilot student Dunnick occupied the left hand seat. Instructor Bibler occupied the right hand seat. Weather conditions at Port Columbus on April 10, 1968, were such that visual flight regulations (VFR) were in effect. Proceeding under IFR conditions in a VFR day placed an obligation upon Bibler to act as 'safety pilot' and observe the classical admonition under VFR conditions of 'see and be seen.'

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[2] There is an identification system used by pilots and controllers which involves the last two digits and letter of a plane's registration. Specific words are used to avoid letter confusion. Thus Cherokee N4239J was known as "39 Juliet" and Bonanza N8318N was referred to as "18 November."

Finding of Fact (3)

Bonanza N8318N (18 November)

Defendant Berry D. Young, a retired United States Air Force Lieutenant Colonel, on April 10 was piloting Beechcraft Bonanza No. 8318N. Defendant Young at the time had logged in excess of 7,000 hours of pilot flying time. He was employed as a salesman by defendant Ohio Aviation Company, a distributor of Beechcraft products. The instrument equipment of 18 November is not significant since Young was flying, on the date in question, under VFR conditions. One such instrument, the air speed indicator, was known to be inaccurate in its operation. Mr. Young had taken off at approximately 14:30 (2:30 p.m.) from the Wood County Airport at Parkersburg, West Virginia. At 1500 (3:00 p.m.) he was proceeding in a westerly direction parallel to Interstate 70 and immediately south thereof. His direction would approximate the magnetic heading of runway 28 and he would be approximately 2 miles south of an eastward projection thereof. He first contacted Local Control at 1504 (3:04 p.m.) locating himself "2 miles south of Charlie Mike" (outer marker).

Finding of Fact (4)

Approach Control (APC)

Approach Control at the Port Columbus tower was made aware of the presence of 39 Juliet at 1440:54 (2:40 p.m.). Its pilot requested a practice instrument approach at the Port Columbus Airport. In answer to its question Approach Control was advised that 39 Juliet was rated and equipped for an ILS approach. It is a matter of definition whether it was so equipped. 39 Juliet could electronically locate the localizer beam; it could not electronically find either the outer marker or the middle marker. The outer marker at Port Columbus can be visually determined and on the first ILS approach, Local Control was advised when 39 Juliet passed the marker.

This was in accordance with previous instruction from Approach Control. An ILS practice approach is treated as a missed approach. 39 Juliet was instructed to execute a right turn to heading 50°, ascend to an altitude of 2,700 feet and return to the frequency of Approach Control. At 1457:50, 39 Juliet did so return and was guided or 'vectored' in a clockwise direction for a second approach to the runway. Thereafter Approach Control gave 39 Juliet the following instructions: 1500:16 heading 100°; 1501.25 heading 180°; 1502:26 heading 260°.

At 1503:47, 39 Juliet was noted by Approach Control as 'on the localizer a mile from the marker.' At no time did Approach Control have radio contact with 18 November. APC was, however, aware that 18 November would land on runway 28 left.

Finding of Fact (5)

Local Control (TWR)

Local Control did not have in 1968 a radar scope that would assist its controllers (or Tower Control) in locating and monitoring a specific plane. The tower controllers were required to make visual locations assisted by binoculars when those were indicated. TWR had contact with 39 Juliet on the first approach from 1449, when it was advised that 39 Juliet had passed the outer marker, until 1457:50, when the pilot returned to the frequency of Approach Control. At 1503:23 TWR was advised that 39 Juliet was on the localizer. Approach Control advised that if 39 Juliet got in TWR's way he was to be turned south.

Approximately 37 seconds later at 1504, 18 November advised TWR that he was 2 miles south of Charlie Mike for landing. TWR instructed 18 November to land on runway 28 left number two following a flight of Lake Central Airlines in a Nord aircraft. This transmission included notice of traffic coming upon the outer marker intending an ILS low approach. The term 'low approach'

or 'low go' refers to a landing approach that will not be completed.

At no time after 1457:50 was there radio communication between 39 Juliet and Local Control although no later than 1504:47, 39 Juliet did in fact cross the outer marker. 39 Juliet never contacted TWR during the time it was inside the outer marker. Its last advice at 1507:45 was made to Approach Control and its radio in the wreckage was found to be tuned to 119.0 mg. Approach Control frequency (Ex. 45 at 8).

Finding of Fact (6)

Time and Location

In midair collision cases, the relative positions of the aircraft are of sufficient importance to be considered in detail. The Court finds that the positions of the two aircraft over the crucial period of time prior to their crash, were as follows:

POSITION

	39J	18N
Prior to 1500		
1459:07	North East of Tower 2 mi. heading 50°	Unknown – heading westerly from Parkersburg, W. Va.
1500-1501		
1500:16	Heading 100°	Unknown – heading westerly from Parkersburg, W. Va.
1501-1502		
1501:25	Heading 180°	Unknown – heading westerly from Parkersburg, W. Va.
1502-1503		
1502:26	Heading 260°	Unknown – heading westerly from Parkersburg, W. Va.

1503-1504		
1503:23	On the localizer	Unknown – heading westerly from Parkersburg, W. Va.
1503:47	On the localizer a mile from the marker	Unknown – heading westerly from Parkersburg, W. Va.
1504-1505		
1504:14½	On the localizer	2 mi. s. of Charlie Mike
1504:44½	On the localizer	down by Pandora's Box
1505-1506		
1505:34*	On the localizer	South of the approach course
1506-1507		
1506:41	On the localizer	In sight [of Tower]
1507-1508		
1507:45	A beam Western Electric	

Finding of Fact (7)

Knowledge of Parties

(A) Knowledge of 18 November – After contacting Local Control at 1504, Young was advised to plan to land on runway 28 left following the Lake Central Nord and to watch traffic coming up on the outer marker making an ILS low approach. The term, 'coming up on the outer marker,' indicates a position of such traffic at that time east of the outer marker. Because only 13 seconds had elapsed from the location of 39 Juliet at one mile from the outer marker, this statement was correct. At 1505:47* he was advised of the Lake Central Nord about a mile out of the airport and cleared to land on runway 28 left.

(B) Knowledge of 39 Juliet – Following the vectoring that had ended at 1502:26, 39 Juliet had received from Approach Control a clearance for a straight in ILS 28L

approach. At 1503:47 he was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term 'spaced in reference to Lake Central Nord' is not a clearance to land nor is it a landing sequence. At 1507:45, 39 Juliet knew he was inside the outer marker since he advised Approach Control 'a beam of Western Electric.' No conversation at any time in this approach was had with Local Control.

(C) Knowledge of Approach Control – At 1502:26 Approach Control knew that 39 Juliet was heading 260° intending another missed approach. At 1503:47 he knew that 39 Juliet was on the localizer one mile from the outer marker. At 1504:34 Approach Control knew that 18 November was intending to land on 28 left. At 1504:44½ Approach Control knew that 18 November was in the vicinity of Pandora's Box heading for the approach to 28 left. At no time did Approach Control speak to 18 November. Alone of the four parties involved, Approach Control possessed all of the critical information. Two planes no more than three miles apart were planning to use the same runway approach and were converging thereon. The radar scope that had previously located 39 Juliet 'one mile from the outer marker' and 18 November 'down by Pandora's Box' was available to alert Approach Control of the decreasing separation between the two planes.

(D) The knowledge of Local Control – At 1503:23 he knew that 39 Juliet was on the localizer. At 1504 he knew that 18 November was 2 miles south of the outer marker. At 1505:44° he knew that 18 November was south of the approach and could see the Lake Central Nord. At 1505.51° he was advised that 18 November would land a little long. At 1506:41 he had 18 November in sight and cleared him to land on runway 28 left. He had no precise knowledge of the location of 39 Juliet. Neither the communication of 1503:47 identifying 39 Juliet one mile from the outer marker nor the communication of 1507:45 identifying 39 Juliet 'just a beam of West-

> ern Electric' was received by the Tower since these communications were on Approach Control frequency. Bearing on local control's lack of knowledge concerning the location of 39 Juliet is the fact that as late as 1507:44 he inquired whether that plane was within the outer marker." (Footnotes 3, 4 and 5 omitted.)

The law applicable to this Federal Tort Claims Act action is, of course, that of the State of Ohio, where the accident occurred. *Richards* v. *United States*, 369 U.S. 1 (1962). Ohio law makes no provision for a comparative negligence, and as the District Judge held, it bars recovery to any plaintiff whose negligence contributed as a proximate cause to the happening of the accident.[1] *Bahm* v. *Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St. 2d 19 (1966); *Drown* v. *Ohio Traction Co.*, 76 Ohio St. 234 (1907).

As we have indicated, the District Judge held that Bibler's contributory negligence consisted of failing to contact the Tower as he passed the outer marker and failing to maintain radio contact with the Tower while in the airport traffic area.

It is appellant's contention, however, that since Bibler was in contact with Approach Control, he was in contact with the Tower and that he was under no legal duty to report his passing of the outer marker.

We believe that several Federal Aviation Administration Regulations are applicable:

> (1) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. 14 C.F.R. § 91.3 (1973).
>
> (2) *Communications with control towers operated by the United States.* No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States

[1] Plaintiff is suing as Administratrix of the estate of her deceased husband, and hence, his contributory negligence would bar her claim.

unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with § 91.127. 14 C.F.R. § 91.87(b) (1973).

(3) The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible—

(a) The time and attitude of passing each designated reporting point, or the reporting points specified by ATC, except that while the aircraft is under radar control, only the passing of those reporting points specifically requested by ATC need be reported;

(b) Any unforecast weather conditions encountered; and

(c) Any other information relating to the safety of flight. 14 C.F.R. § 91.125 (1973).

(4)(e) *Overtaking.* Each aircraft that is being overtaken has the right of way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

(f) *Landing.* Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft. 14 C.F.R. § 91.67(e) & (f) (1973).

Likewise applicable to our problems on this appeal is a sentence from the Airman's Information Manual:

"During the time an IFR flight is operating in VFR weather conditions, it is the direct responsibility of the

pilot to avoid other aircraft, since VFR flights may be operating in the same area without knowledge of ATC (air traffic control)." *Airman's Information Manual* (AIM, 1-58).

Of similar applicability is a Port Columbus regulation which places on the Approach Controller the specific duty of telling the pilot of an airplane which he has cleared for an approach to contact Tower Control when he reaches the final approach fix. TERMINAL AIR TRAFFIC CONTROL MANUAL, Rule 674(d).

With these facts and these rules and regulations in mind, we conclude that the District Judge's finding of contributory negligence on the part of pilot Bibler must be affirmed and therefore the two original causes of action were properly dismissed.

Under Rule 52(a) of the Federal Rules of Civil Procedure, this court cannot set aside the findings of fact of the District Judge unless we can say that they are "clearly erroneous." Judge Rubin's findings are not only not "clearly erroneous"; we believe they are support by the great weight of the evidence in this record. Indeed, as pointed out above, aside from interpretations of the regulations and inferences from the facts, they are undisputed.

We now turn directly to Judge Rubin's conclusions pertaining to pilot Bibler's contributory negligence. Like the District Judge, we believe that 14 C.F.R. § 91.87(b) (1973), specifically forbids operating any aircraft within an airport traffic area (described at the time as within five miles of the Tower and below 2,000 feet) which airport has a control tower operated by the United States "unless two-way radio communications are maintained between that aircraft and the control tower." Like the District Judge, we reject the appellant's contention that Bibler satisfied this rule by maintaining two-way radio contact with the Approach Controller. This record which contains much expert testimony, demonstrates conclusively that when the term "Control Tower" or "Tower" is used in

connection with operations "within an airport traffic area," the terms refer to local control and not to approach control. This conclusion is strengthened by the fact that under visual flight conditions, such as prevailed on the date of this accident, Approach Control would not routinely have radio contact with in-bound traffic. Like Young's plane (18N), such traffic would ordinarily report only to the Tower (local control) at the outer marker. Thus Approach Control would be powerless to talk to or guide away from danger most of the planes within the airport traffic area.

Since the State of Ohio has adopted Federal Air Regulations as its own (*See* Ohio Rev. Code, §§ 4561.05, 4561.14), we believe that Bibler's violation of 14 C.F.R. § 91.87(b) was also a violation of Ohio law, and negligence per se. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349 (1920); *Eastern Airlines* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907 (1955).

We also affirm the District Judge's conclusion that pilot Bibler was guilty of contributory negligence in failing to "advise local control that he had passed the outer marker."

Strangely, the federal regulations on this score (*See* § 91.125 previously quoted) are not sufficiently definite to support this conclusion as a matter of law. But this record shows that the weight of the expert evidence does support the District Judge's statement in this regard. The testimony of expert witness Culley is persuasive:

> Q. And as a pilot, when an aircraft is making an actual or simulated ILS approach, is there anything the pilot must do in passing over the outer marker as required by good operating procedures?
>
> A. Yes, he should most definitely report the final approach fix or the outer marker in this case to the local controller or to approach control.
>
> THE COURT: Mr. Pangia, excuse me just a moment. May I ask you a question in this regard: You said he should.

THE WITNESS: Yes, sir.

THE COURT: Now, does that mean he must or is it just good practice to do so?

THE WITNESS: It is not required by Federal Air Regulations that he do so, but it is a part of the recommended air traffic control procedures on which all instrument flying is predicated.

THE COURT: Okay. His failure to do so does not subject him to any discipline? Aside from the question of negligence, I don't want to get into that, but his failure to do as you stated is not a violation of any of the FAA regulations?

THE WITNESS: No, sir, it is not.

THE COURT: Thank you. You may proceed.

Q. (By Mr. Pangia) Is it fair to say, Mr. Culley, that there are many things which pilots should do in the operation of the aircraft that are not spelled out exactly in the Federal Aviation Regulations?

A. Absolutely.

Q. Mr. Cully, if an aircraft was making an ILS approach, practice or otherwise, and he was not told to change from approach to the tower frequency, what, if anything should the pilot do?

A. As a pilot, if he has not been told to report or instructed to report as he approaches the marker, he should query approach control as to whether or not he wants him to change frequency to local control. If in the event we have a frequency congestion and he can't get to him or can't get a reply, he automatically changes to local control, the reason being, if I may say, as a pilot, I am interested in the traffic ahead of me. If I continue to monitor approach control frequency, I am only getting traffic that is behind me and to the side of me. If I am on the tower frequency, I can hear other traffic and communication with the tower, and I can determine their position from that report.

Q. And if an aircraft were not making a radar approach, Mr. Culley, would he get his landing sequence and clearance to land from the local controller?

A. Landing sequence and clearance to land is assigned by the approach controller under these conditions.

Q. I am sorry.

A. I beg your pardon, under tower control.

Q. Is it done by the approach controller in that condition?

A. No, sir, it is not.

While we recognize that Culley's testimony might be affected by his employment with defendant, Federal Aviation Administration, other witnesses, including plaintiff Sundin (owner of the plane Bibler was flying) furnish confirmation of the essential points of this testimony.

Finally, the Airman's Manual contains this paragraph:

Report Leaving Final Approach Fix

Pilots conducting a prescribed instrument approach are reminded of the importance of reporting to ATC or an FSS when over the final approach fix on final approach. ATC may predicate separation between departures and arrivals and between successive arrivals on the basis of this report; therefore, failure to make this report may compromise separation criteria. *Airman's Information Manual*

This instruction is vividly underlined by the comment of the Local Controller immediately after the mid-air collision on April 10, 1968:

"He [Bibler (39J)] never called me at the marker."

Since pilot Bibler's failure to report at the Marker or to contact Local Control deprived Local Control of knowledge that Bibler's plane (39J) had passed the marker and was in proximity of Young's plane (18N), it served to prevent action by Local Control to warn and separate the converging planes. It also served to deprive Bibler of knowledge of Young's clearance to land and Young of Bibler's presence within the airport traffic area. Clearly the negligence we have described

on Bibler's part was a proximate cause of the accident. Such contributory negligence under the Ohio cases cited earlier bars recovery by either plaintiff Administratrix or plaintiff Sundin in the original actions, regardless of whether or not the negligence of the Approach Controller (in failing to tell Bibler to switch to Local Control) contributed as a proximate cause also.

There remains for our consideration only appellant's vehement protest against recovery by Ohio Aviation of the $17,000 worth of damages suffered by the Bonanza 18N piloted by appellee Young. Here appellant relies upon a regulation which places the burden of yielding the right of way upon an overtaking plane (*See* 14 C.F.R. § 91.67) *i.e.* upon Young. Since visual flight conditions prevailed at the time and place concerned, the fact that neither pilot ever saw the other is apparently explained by the fact that Young's plane (18N) was both above and behind Bibler's, and hence, as found by the District Judge, Young could not see Bibler and Bibler could not see Young because of the configuration of their planes.

At the time and place concerned Young had a clearance to land and was proceeding according to it. Bibler did not have a clearance to land; he had only a clearance to approach. Thus, under 14 C.F.R. § 91.67(f), Young had the right of way over Bibler. At the time and place concerned Young did not know that what turned out to be Bibler's plane (39J) was even in the airport traffic area. Expert testimony supports the District Judge's conclusion that Young's failure to take extraordinary measures to observe below him by side slipping and veering off his course (while landing) was not negligence – even though by hindsight such action might well have prevented the accident.

For these reasons and others spelled out in the District Judge's Findings of Fact Opinion and Conclusions of Law, the judgments of the District Court are affirmed.

APPENDIX C.

OPINION OF THE DISTRICT COURT

IN THE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL NO. 70-56
CIVIL NO. 70-82

ANN E. BIBLER, admx. of the estate of Ralph D. Bibler, deceased, etc.,

PLAINTIFF,

vs.

BERRY H. YOUNG, JR., et al.,

DEFENDANTS.

DONALD L. SUNDIN,
dba SUNDIN AVIATION COMPANY,

PLAINTIFF,

vs.

UNITED STATES OF AMERICA and
FEDERAL AVIATION ADMINISTRATION,

DEFENDANTS.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed October 6, 1971)

I

INTRODUCTION

In dealing with a midair collision and the circumstances which culminate in such a tragedy, a court, of necessity, enters a complex and somewhat alien world. It is a world inhabited by uniquely trained people, speaking a strange but precise jargon and utilizing highly sophisticated machines. It is an inter-dependent and self-contained world in which the pilots and air controllers must share information with one another and where failure to do so may bring swift disaster. The knowledge necessary to avoid catastrophe may initially be within the peculiar knowledge of only one of the several participants, for there are major contrasts between the almost unlimited physical vision of a pilot in a cockpit and the circumscribed visual limitations of a controller in a darkened radar room. But conversely a pilot exists in an environment where at times weather conditions, physical surroundings and speed of his aircraft make him dependent upon the greater electronic vision of the controller's radar scope.

Perhaps most importantly, we are dealing with a world where the failure to share essential information results, often enough, in all to apparent disasters. One such accident occurred on April 10, 1968, at Port Columbus Airport, Columbus, Ohio. This accident forms the subject matter of the present law suit as to which the Court makes the following findings of fact.

II

FINDINGS OF FACT

Finding of Fact (1)

General Conditions at Columbus International Airport

Columbus International Airport, known by pilots as CMH, is located in Franklin County, Ohio immediately east of

the City of Columbus. Its main runways lie in an east-west direction. Airport runways are identified by the first two digits of direction. Accordingly, the two main runways of Port Columbus are 28 left and 28 right, indicating an east to west bearing of approximately 280 degrees. When used west to east the same runways are known as 10 left and 10 right, signifying a heading of approximately 100 degrees. The precise magnetic bearing of 28 left and 28 right is 276 degrees.

Runway 28 left is 10,700 feet long and 150 feet wide. It is equipped for instrument landing and includes an electronic extension in the same compass heading referred to as a "beam." At a point 5.4 nautical miles (6.2 statute miles) east of runway 28's left threshold is the "outer marker." An outer marker is an electronic device that advises a pilot when he has passed over it on his way to a landing.

Between the outer marker and the runway threshold there is a middle marker which likewise electronically advises the pilot that he has passed over such marker. A pilot may receive such information by a Beacon Marker Indicator which will cause a light to flash on the instrument panel and an audible radio signal to be given, or by a low frequency ADF receiver which will receive in Morse Code the identifying letters of the marker. The outer marker on runway 28 left is identified by the letters CM and is known by the term "Charlie Mike."

A plane need not contain such equipment in order to use part of the electronic extension of runway 28 left. A plane can be equipped merely to ascertain its position in relation to the electronic extension or "localizer beam" and be guided onto the localizer for ultimate landing on the runway.

The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus control tower. There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control.

also known as Local Control (TWR),[1] which has jurisdiction over air traffic within the five mile radius. APC operations extend for approximately forty miles around Port Columbus. Local Control is housed at the top of the control tower. In 1968, when this accident occurred, Local Control did not have radar equipment and relied on visual sightings to identify and direct landing aircraft. The two control departments communicate with pilots on assigned frequencies: APC on 119.0 megahertz and TWR on 121.5. Because their jurisdictions are exclusive, pilots do not customarily communicate with both departments simultaneously.

When a pilot is flying under instrument flight regulations (IFR), he communicates with Approach Control until he reaches the outer marker. At this time he is advised to contact Local Control in the tower on its frequency and report his presence. When a pilot is flying under visual flight regulations (VFR) he is not required to advise Approach Control of his presence, but contacts instead Local Control when he is in the vicinity of the outer marker.

Finding of Fact (2)

Cherokee N42 39J (39 Juliet)[2]

On April 10, 1968, Ralph D. Bibler, decedent, was a duly qualified and licensed commercial pilot and flight instructor with over 1000 hours of pilot flight time. He was in command of a Piper Cherokee aircraft, Registration No. N4239J. At approximately 3:00 p.m. on that date, he was instructing a student, one David Dunnick, in the procedures for instrument landing at Port Columbus. Mr. Dunnick had logged 123 hours of flight time. The plane was equipped with an

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[2] There is an identification system used by pilots and controllers which involves the last two digits and letter of a plane's registration. Specific words are used to avoid letter confusion. Thus Cherokee N4239J was known as "39 Juliet" and Bonanza N8318N was referred to as "18 November."

omni-converter for localizer guidance. It was not equipped with an ADF radio Beacon Marker Indicator or any other electronic means of establishing position in relation to the outer marker. Prior to 3:00 p.m., 39 Juliet was operating under Instrument Flight Regulations (IFR) procedures with student Dunnick at the controls. Dunnick was wearing a "hood," a vision limiting device which focused his attention upon the instrument panel. As the operating pilot student Dunnick occupied the left hand seat. Instructor Bibler occupied the right hand seat. Weather conditions at Port Columbus on April 10, 1968, were such that visual flight regulations (VFR) were in effect. Proceeding under IFR conditions in a VFR day placed an obligation upon Bibler to act as "safety pilot" and observe the classical admonition under VFR conditions of "see and be seen."

Finding of Fact (3)

Bonanza N8318N (18 November)

Defendant Berry D. Young, a retired United States Air Force Lieutenant Colonel, on April 10 was piloting Beechcraft Bonanza No. 8318N. Defendant Young at the time had logged in excess of 7,000 hours of pilot flight time. He was employed as a salesman by defendant Ohio Aviation Company, a distributor of Beechcraft products. The instrument equipment of 18 November is not significant since Young was flying, on the date in question, under VFR conditions. One such instrument, the air speed indicator, was known to be inaccurate in its operation. Mr. Young had taken off at approximately 14:30 (2:30 p.m.) from the Wood County Airport at Parkersburg, West Virginia. At 1500 (3:00 p.m.) he was proceeding in a westerly direction parallel to Interstate 70 and immediately south thereof. His direction would approximate the magnetic heading of runway 28 and he would be approximately 2 miles south of an eastward projection thereof. He first contacted Local Control at 1504 (3:04 p.m.) locating himself "2 miles south of Charlie Mike" (outer marker).

Finding of Fact (4)

Approach Control (APC)

Approach Control at the Port Columbus tower was made aware of the presence of 39 Juliet at 1440:54 (2:40 p.m.). Its pilot requested a practice instrument approach at the Port Columbus Airport. In answer to its question Approach Control was advised that 39 Juliet was rated and equipped for an ILS approach. It is a matter of definition whether it was so equipped. 39 Juliet could electronically locate the localizer beam; it could not electronically find either the outer marker or the middle marker. The outer marker at Port Columbus can be visually determined and on the first ILS approach, Local Control was advised when 39 Juliet passed the marker. This was in accordance with previous instruction from Approach Control. An ILS practice approach is treated as a missed approach. 39 Juliet was instructed to execute a right turn to heading 50°, ascend to an altitude of 2,700 feet and return to the frequency of Approach Control. At 1457:50, 39 Juliet did so return and was guided or "vectored" in a clockwise direction for a second approach to the runway. Thereafter Approach Control gave 39 Juliet the following instructions: 1500:16 heading 100°; 1501:25 heading 180°; 1502:26 heading 260°.

At 1503:47, 39 Juliet was noted by Approach Control as "on the localizer a mile from the marker." At no time did Approach Control have radio contact with 18 November. APC was, however, aware that 18 November would land on runway 28 left.[3]

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[3] The following dialogue appears in Exhibit 45:

TWR to APC	The guy south of the Marker just talking to me he'll be coming in for the left one.
APC to TWR	I'm not talk, ah (unintelligible) I don't see anybody.
I/C	
TWR to APC	Oh he said he's just south of Charlie Mike.
TWR	One eight November you did say you're just south of Charlie Mike (unintelligible).

Finding of Fact (5)

Local Control (TWR)

Local Control did not have in 1968 a radar scope that would assist its controllers (or Tower Control) in locating and monitoring a specific plane. The tower controllers were required to make visual locations assisted by binoculars when those were indicated. TWR had contact with 39 Juliet on the first approach from 1449, when it was advised that 39 Juliet had passed the outer marker, until 1457:50, when the pilot returned to the frequency of Approach Control. At 1503:23 TWR was advised that 39 Juliet was on the localizer. Approach Control advised that if 39 Juliet got in TWR's way he was to be turned south.

Approximately 37 seconds later at 1504, 18 November advised TWR that he was 2 miles south of Charlie Mike for landing. TWR instructed 18 November to land on runway 28 left number two following a flight of Lake Central Airlines in a Nord aircraft. This transmission included notice of traffic coming upon the outer marker intending an ILS low approach. The term "low approach" or "low go" refers to a landing approach that will not be completed.

At no time after 1457:50 was there radio communication between 39 Juliet and Local Control although no later than 1504:47, 39 Juliet did in fact cross the outer marker. 39 Juliet never contacted TWR during the time it was inside the outer marker. Its last advice at 1507:45 was made to Approach Control and its radio in the wreckage was found to be tuned to 119.0 mg. Approach Control frequency. (Ex. 45 at 8).[4]

I/C
APC to TWR Yes he's down by Pandora's Box.
18N Ah eastbound.
I/C
APC to TWR Help you any?
I/C
TWR to APC Yea.

[4] The speed of 39 Juliet cannot be precisely determined, but it can be approximated. The airplane had traveled from one mile east of the outer marker at 1503:47 to "just a beam of Western Electric" at 1507:45. This distance approximately 4.4 miles. The accident

Finding of Fact (6)

Time and Location

In midair collision cases, the relative positions of the aircraft are of sufficient importance to be considered in detail. The Court finds that the positions of the two aircraft over the crucial period of time prior to their crash, were as follows:[5]

POSITION

	39J	18N
Prior to 1500		
1459:07	North East of Tower 2 mi. heading 50°	Unknown – heading westerly from Parkersburg, W. Va.
1500-1501		
1500:16	Heading 100°	Unknown – heading westerly from Parkersburg, W. Va.
1501-1502		
1501:25	Heading 180°	Unknown – heading westerly from Parkersburg, W. Va.

occurred sometime between 1507:45 and 1508:00. At 1507:45 39 Juliet had traveled a distance of 4.4 miles in three minutes and fifty-eight seconds. Since the speed was well in excess of 60 m.p.h., 39 Juliet crossed the outer marker less than one minute after 1503:47.

[5] Information for the time sequence has been obtained in the following manner: Exhibit 45, the National Transportation Safety Board Aircraft Accident Report, contains at pages 81 to 90 typewritten communication between Approach Control and aircraft and transcription of the radio Tower and aircraft. Wherever stated in that exhibit, the times are accepted as accurate. In addition, Exhibit 46, also identified as Exhibit BH-43, contains a taped re-recording of the official tape. A stop watch has been used to determine the length of times between transcriptions which are not noted on the official tapes. Such times are to be considered as approximations only and are identified with an asterisk in this finding. In no event has the Court used such approximations for the basis of any findings of fact or of any conclusions of law. All times hereafter are referred to in terms of a 24-hour clock wherein the equivalent of 1500 hours is 3:00 p.m.

	39J	18N
1502-1503		
1502:26	Heading 260°	Unknown – heading westerly from Parkersburg, W. Va.
1503-1504		
1503:23	On the localizer	Unknown – heading westerly from Parkersburg, W. Va.
1503:47	On the localizer a mile from the marker	Unknown – heading westerly from Parkersburg, W. Va.
1504-1505		
1504:14½	On the localizer	2 mi. s. of Charlie Mike
1504:44½	On the localizer	down by Pandora's Box
1505-1506		
1505:34*	On the localizer	South of the approach course
1506-1507		
1506:41	On the localizer	In sight [of Tower]
1507-1508		
1507:45	A beam Western Electric	

Finding of Fact (7)

Knowledge of Parties

(A) Knowledge of 18 November – After contacting Local Control at 1504, Young was advised to plan to land on runway 28 left following the Lake Central Nord and to watch traffic coming up on the outer marker making an ILS low approach. The term, "coming up on the outer marker," indicates a position of such traffic at that time east of the outer marker. Because only 13 seconds had elapsed from the location of

39 Juliet at one mile from the outer marker, this statement was correct. At 1505:47* he was advised of the Lake Central Nord about a mile out of the airport and cleared to land on runway 28 left.

(B) Knowledge of 39 Juliet – Following the vectoring that had ended at 1502:26, 39 Juliet had received from Approach Control a clearance for a straight in ILS 28L approach. At 1503:47 he was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term "spaced in reference to Lake Central Nord" is not a clearance to land nor is it a landing sequence. At 1507:45, 39 Juliet knew he was inside the outer marker since he advised Approach Control "a beam of Western Electric." No conversation at any time in this approach was had with Local Control.

(C) Knowledge of Approach Control – At 1502:26 Approach Control knew that 39 Juliet was heading 260° intending another missed approach. At 1503:47 he knew that 39 Juliet was on the localizer one mile from the outer marker. At 1504:34 Approach Control knew that 18 November was intending to land on 28 left. At 1504:44½ Approach Control knew that 18 November was in the vicinity of Pandora's Box heading for the approach to 28 left. At no time did Approach Control speak to 18 November. Alone of the four parties involved, Approach Control possessed all of the critical information. Two planes no more than three miles apart were planning to use the same runway approach and were converging thereon. The radar scope that had previously located 39 Juliet "one mile from the outer marker" and 18 November "down by Pandora's Box" was available to alert Approach Control of the decreasing separation between the two planes.

(D) The knowledge of Local Control – At 1503:23 he knew that 39 Juliet was on the localizer. At 1504 he knew that 18 November was 2 miles south of the outer marker. At 1505:44* he knew that 18 November was south of the approach and could see the Lake Central Nord. At 1505:51*

he was advised that 18 November would land a little long. At 1506:41 he had 18 November in sight and cleared him to land on runway 28 left. He had no precise knowledge of the location of 39 Juliet. Neither the communication of 1503:47 identifying 39 Juliet one mile from the outer marker nor the communication of 1507:45 identifying 39 Juliet "just a beam of Western Electric" was received by the Tower since these communications were on Approach Control frequency. Bearing on Local Control's lack of knowledge concerning the location of 39 Juliet is the fact that as late as 1507:44 he inquired whether that plane was within the outer marker.

Finding of Fact (9)

Miscellaneous Facts of Slight Significance

Evidence indicated an erroneous setting of the altimeter in 39 Juliet. This setting, the advice to Approach Control of the electronic equipment in 39 Juliet, the inaccurate air speed indicator in 18 November, and the angle of collision do not appear to be significant items in terms of proximate cause. Expert testimony established that the angle of difference between the headings of the two aircraft was approximately 30 degrees at the time of collision. While counsel have variously suggested that the inexperience of student pilot Dunnick, gusts of wind or erroneous headings might have caused such angle of collision, it does not appear that this angle bears upon the legal issue involved. None of the foregoing relates to proximate cause of the collision.

III

OPINION

In the opinion of this Court the evidence that has been adduced herein clearly indicates negligence on the part of Bibler. He failed to advise the Local Control that he had passed the outer marker. In fact, he continued to report to Approach Control until moments before the actual collision

when he stated that he was "a beam of Western Electric." Perhaps either a lapse of memory on his part or some other undiscoverable circumstance caused Bibler, an inexperienced pilot, to remain on Approach Control's frequency inside of the outer marker, where Approach Control had no jurisdiction. If we assume 39 Juliet was traveling at about 70 miles per hour, Bibler was traveling, for at least three minutes, inside of the outer marker and on Approach Control's frequency. It is difficult to justify this conduct or to find it to be non-negligent. The conduct additionally was a proximate cause of the collision because it placed Bibler in air space unknown to the Tower and not reasonably ascertainable by it on line of sight.

While it may be asserted that an agency of the defendant United States was also negligent in failing to instruct 39 Juliet to contact the Tower at the outer marker, such negligence cannot absolve the plaintiff.

Plaintiff's decedent, Ralph Bibler, was contributorily negligent because of his failure to contact the Tower as he passed the outer marker; to advise, for a period in excess of three minutes prior to the accident, that he was west of the marker; and to advise the Tower of his location "a beam of Western Electric." These failures on his part demonstrate that he neglected to exercise due care for his own safety.

There is insufficient evidence of negligence by either the Tower or defendant Barry Young. Based upon the information supplied to it by the other parties, Tower had reason to believe that Bibler was, at all times material to the events herein, east of the outer marker. The location of Bibler on the localizer at 1503:23 supplied Tower with only his compass heading. Bibler, at the time this transmission was received by the Tower, could have been as much as 20 miles east of the outer marker. As we have noted above, the transmission of 1503:47 which placed 39 Juliet on the localizer one mile from the outer marker was not received by the Tower. The failure of the Tower to locate 39 Juliet visually under the weather conditions prevail-

ing on the date of the accident does not rise to the level of proximate cause.

There was no apparent negligence on the part of defendant Young. He proceeded in accordance with information supplied to him by the Tower. He followed instructions by checking in with the Tower which cleared him to land, and he ultimately lined up his plane for landing in conformity with these instructions. We do not believe that the inaccuracy of his air speed indicator bears in any significant manner upon the issue of proximate cause.

Nor do we think that Young's failure to visually observe 39 Juliet constitutes negligence per se. The inherent configuration of small planes, such as both the Cherokee and the Bonanza, create substantial areas of non-visibility. The course that Young followed required a left turn prior to his final approach. By raising his right wing he additionally obliterated the area in which the Cherokee was traveling. This maneuver was necessary to his expected landing and there was no evidence that Young expected to or could have, at any time, seen 39 Juliet. He had no reason to anticipate Bibler west of the marker. We conclude that Young proceeded in the fashion of a reasonably prudent pilot. Plaintiff's evidence failed, in our opinion, to show specific acts of negligence on Young's part.

Finally, under settled principles of Ohio law, the doctrine of last clear chance has no application in the case at bar to relieve Bibler from the consequences of his own contributory negligence. It is true that Approach Control was the only entity that knew, at a time immediately prior to the accident, of the relative locations of the two planes. Beginning at 1503:47 it had precisely located 39 Juliet; at 1504:44 it had located 18 November. For a period of between three and four minutes Approach Control had the capability of noting that two planes were in a collision course. Ironically, Bibler's own contributory negligence in failing to contact Tower had the effect of retaining him on Approach Control's frequency. Approach Control could have instructed Bibler to take evasive

action or it could have advised Tower to order Young to do the same.

Approach Control's failure to do this, however, does not relieve Bibler from the effects of his contributory negligence through the doctrine of last clear chance. It was stated in *Brock* v. *Marlatt*, 128 O.St. 435, 438 (1934) that:

> The last clear chance rule has no application to any situation except where the injured party through his own negligence has placed himself in a position of peril. The doctrine presupposes his antecedent fault and negligence, as a result of which he is in a place of peril. His negligence does not absolve the defendant from liability, if, knowing such peril, defendant fails thereafter to exercise ordinary care to avoid causing injury. *Such charge is not proper where the claimed negligence of the defendant and the contributory negligence of the plaintiff are concurrent.* (emphasis added)

That the plaintiff's concurrent and on-going negligence prevents the application of the counter defense of last clear chance, was further underscored in *Cleveland Ry. Co.* v. *Masterson*, 126 O.St. 42, 51 (1932) where Justice Jones wrote that:

> It is only in those cases of prior negligence on plaintiff's part, not actively continuing to the time of injury, that the last clear chance rule applies.

Also see *Peters* v. *Transfer Co.*, 7 Ohio St.2d 143, 150 (1966); *Lones* v. *Detroit, Toledo and Ironton Ry. Company*, 398 F.2d 914, 920 (C.A. 6 1968) (applying Ohio law), *cert. denied* 393 U.S. 1063 (1969); *Pennsylvania Co.* v. *Hart*, 101 O.St. 196 (1920); *Columbus Green Cabs, Inc.* v. *Seip*, Ohio App., 65 O.L.Abs. 428, 115 N.E.2d 5 (1952); *Pflugh* v. *United States*, 138 F.Supp. 470 (W.D. Pa. 1951) (applying Ohio law).

As we have noted above, Bibler was negligent in failing to communicate with the Tower at the time he passed the outer marker. This negligence continued until and was concurrent

with the negligence that resulted in the accident. Because Bibler's negligence contributed to the proximate cause that resulted in his death, Ohio law bars his recovery. See *Bahm* v. *Pittsburgh & L.E. R. Co.*, 6 O.St.2d 192, 35 O.Ops.2d 307 (1966); *Lehman* v. *Leffler*, 78 O.St. 448 (1908); *Brown* v. *Northern Ohio Traction Co.*, 76 O.St. 234, 81 N.E. 328 (1907); *Northwest Airlines* v. *Glenn L. Martin Co.*, 224 F.2d 120 (C.A. 6 1955), *cert. denied* 350 U.S. 937 (1956); *Nice* v. *Pennsylvania Ry. Co.*, 168 F.Supp. 641 (N.D. Ohio E.D. 1959); *McDonough* v. *Buckeye S.S. Co.*, 103 F.Supp. 473 (N.D. Ohio E.D. 1952), *aff'd.* 200 F.2d 558 (C.A. 6 1952), *cert. denied* 345 U.S. 926 (1953). Since this negligence continued until the accident, the doctrine of last clear chance cannot alter this result.

IV

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action under the Federal Tort Claims Act, 18 U.S.C. 1346(b).

2. The law of the State of Ohio, the place where the alleged acts or omissions of negligence took place, governs this action. See *Richards* v. *United States*, 369 U.S. 1 (1962).

3. Under the law of the State of Ohio contributory negligence of the plaintiff, if it contributes to the proximate cause of the accident, is a complete defense and bar to recovery. See *Brown* v. *Northern Ohio Traction Co., supra; Lehman* v. *Hayman, supra; Nice* v. *Pennsylvania Ry. Co., supra; McDonough* v. *Buckeye S.S. Co., supra.*

4. Federal Aviation Regulations provide that the pilot-in-command is responsible for, and is the final authority as to, the operation of that aircraft. See 14 C.F.R. 91.3; *United States* v. *Miller*, 303 F.2d 710 (C.A. 9 1962); *United States* v. *Schultetus*, 277 F.2d 322 (C.A. 5 1960), *cert. denied* 364 U.S. 828 (1960); *Hamilton* v. *United States*, No. C-48398, — F. Supp. — (N.D. Calif. Oct. 21, 1971).

5. Federal Aviation Regulations provide that no person may within an airport traffic area, or in the case of Port Columbus within the outer markers, operate an aircraft to, from or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. See 14 C.F.R. 91.87.

6. Bibler's failure to contact the tower once he passed over the outer marker was negligence as a matter of law.

7. Bibler's conduct, as it violated the conclusions of law set forth in Nos. 5 and 6 above, constitutes contributory negligence as a matter of law and bars his recovery under the authorities cited in Conclusions of Law Nos. 2 and 3.

8. The paramount responsibility for the safe operation of aircraft under VFR weather conditions continues to rest with the pilot of the aircraft. See *United States* v. *Miller, supra; United States* v. *Schultetus, supra; Hamilton* v. *United States, supra; Compagnie Nationale Air France* v. *Port of New York Authority, et al.*, 10 Avi. 18, 356 (E.D. N.Y. 1969), *aff'd.* 427 F.2d 951 (C.A. 2 1971); *American Airlines, Inc.* v. *United States*, 418 F.2d 180 (C.A. 1 1969); *Stanley* v. *United States*, 239 F.Supp. 973 (N.D. Ohio 1969); *Tilley* v. *United States*, 375 F.2d 678 (C.A. 4 1967).

9. Bibler's negligence continued from the time his plane passed the outer marker until the time of impact and contributed to the proximate cause of his injuries. Therefore, under Ohio law, the doctrine of last clear chance does not relieve him of the consequences of his contributory negligence. See *Cleveland Ry. Co.* v. *Masterson, supra; Brock* v. *Marlatt, supra; Lones* v. *Detroit, Toledo & Ironton Ry. Co., supra;* and cases cited at 14, *supra.*

10. The evidence fails to establish negligence, as a matter of law, on the part of defendant Young.

11. Since the negligence of the plaintiff's decedent was a proximate cause of the accident, plaintiffs cannot recover.

12. For the reason set forth in Conclusion of Law No. 11, Sundin, the decedent's master and plaintiff in No. 70-82, cannot recover because of the contributory negligence of his servant.

13. Plaintiffs' causes of action must be dismissed.

14. For the reasons set forth in Conclusions of Law Nos. 11 and 12, defendant United States of America's cross-claims will be dismissed as moot.

15. Defendant United States of America is entitled to a judgment in its favor.

The parties shall submit a form of judgment, in accordance with the views and conclusions expressed herein, within ten (10) days from the filing date hereof. No costs.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX D.

TERMINAL AIR TRAFFIC CONTROL MANUAL

• • •

674. ARRIVAL INSTRUCTIONS.

Issue all of the following to an aircraft before it reaches the approach gate: (E)

a. Position with respect to the final approach fix.

b. Vector to intercept the final approach course, if required.

c. Approach clearance, except when conducting a surveillance or precision approach.

d. Instructions to do one of the following:

(1) *Monitor local control frequency,* reporting to the tower when over the approach fix.

(2) Contact the tower on local control frequency.

(3) Contact approach control on final approach frequency if a surveillance or precision approach will be made.

(4) *When radar is used to establish the final approach fix – inform the pilot that after being advised that he is over the fix, he is to contact the tower on local control frequency.*

APPENDIX E.

EXCERPTS FROM FAA INSTRUMENT FLYING HANDBOOK

Airport Traffic Control Towers

Jurisdiction – The ATC tower is responsible for control of aircraft on and in the immediate vicinity of airports. Terminals handling a large traffic volume employ specialized personnel for operation; they use light signals, radio, and ASDE radar (Airport Surface Detection Equipment) for control of surface traffic. Less congested airports have fewer controllers to handle the workload with less specialization. Organization of the tower operation falls into the following units:

Local Control is concerned mainly with VFR traffic in and around the traffic pattern and with ground traffic. The local controller works with the other IFR controllers to integrate VFR and IFR flights into a smooth, safe traffic flow in and out of the airport.

Ground Control directs the movement of aircraft on the airport surface, working closely with other tower positions. The controller relays clearances from ARTCC to departing IFR flights unless a special position is assigned that function.

Clearance Delivery is accomplished by a separate controller at most busy terminals where heavy ground traffic and frequent IFR departures require division of the workload.

Departure Control originates departure clearances and instructions to provide separation between departing and arriving flights. Although the physical location of this controller varies at different terminals – in the tower at some locations, in separate radar installations at others – he coordinates closely with the Approach Controller and Local Controller.

Approach (Arrival) Control formulates and issues approach clearances and instructions to provide separation between arriving IFR aircraft, using radar if available.

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1201

ANN E. BIBLER, ADMINISTRATRIX OF THE ESTATE OF RALPH D. BIBLER, DECEASED, ON BEHALF OF HERSELF AS SURVIVING SPOUSE AND MINOR CHILD, AND DONALD L. SUNDIN D/B/A SUNDIN AVIATION CO.,

Plaintiffs-Appellants,

vs.

BERRY H. YOUNG, Jr.; OHIO AVIATION COMPANY, OHIO AVIATION DISTRIBUTORS, INC.; DAYTON MUNICIPAL AIRPORT; UNITED STATES OF AMERICA; AND THE FEDERAL AVIATION ADMINISTRATION, PORT COLUMBUS AIRPORT,

Defendants-Appellees.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

JUDGMENT

(Filed February 27, 1974)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be and the same are hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

A True Copy.
Attest:

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: April 9, 1974
COSTS: Awarded to Appellee